No. 22,416

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

JAYCOX SANITARY SERVICE OF GARDEN GROVE, INC., and JOYCOX SANITARY SERVICE OF ANAHEIM, INC.,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT.

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TABLE OF AUTHORITIES CITED

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STATEMENT OF THE CASE.

I.

Statement Regarding All Issues Other Than Reinstatement of Paul Infante.

In the main, Respondent's position regarding all issues has been stated heretofore in its Brief In Support of Exceptions to Trial Examiner's Decision. To facilitate an orderly review, Respondent's position will be restated in this Brief submitted in opposition to the National Labor Relations Board's petition for enforcement of its order.

Respondent and Teamster's Local No. 396 executed a written stipulation on August 3, 1966, which was attached to Respondent's Brief In Support of Exceptions. The contents of said stipulation were as follows:

> "IT IS HEREBY STIPULATED by and between the undersigned parties, through their respective attorneys of record, that all issues, charges and matters now pending in the above-entitled matter before the National Labor Relations Board except as provided hereinafter be dismissed. This stipulation is a petition to the National Labor Relations Board to dismiss such issues, charges and matters for the reasons set forth below:
>
> "(1) Since the matter was litigated, the Employer has recognized and bargained collectively with the charging party as the exclusive collective bargaining agent of all the employees within the appropriate unit sought by the charging party. Said recognition and bargaining are evidenced by a contract which went into effect on April 18, 1966. An order to bargain collectively is not, therefore, required.
>
> "(2) It is the position of both the employer and the charging party that all other matters litigated in the above-entitled cause, except the discharge of Paul Infante, have been effectively remedied.
>
> "By this stipulation, the National Labor Relations Board is respectfully petitioned to dismiss all charges except the 8(a)(1) and (3) charge in con-

nection with the aforesaid terminated employee, Paul Infante, before any final order is issued by the Board, and to limit the decision and order of the Board to the issue so excepted."

Dated: August 3, 1966

NAGEL & REGAN
BY: A. Patrick Nagel /s/
Attorneys for Respondent

BRUNDAGE & HACKLER
BY: L. D. Mathews Jr. /s/
L. D. Mathews Jr.
Attorneys for Local No. 396"

The provisions of this stipulation cover only a small portion of the entire factual background. Even before the trial of the issues, Respondent's counsel, coming into the case after all the facts constituting unfair labor practices had been committed, became acutely aware that the labor organization in question did in fact at all times material to this proceeding represent the majority of the employees in an appropriate bargaining unit and recommended to Respondent that it recognize the charging labor organization as the collective bargaining agent.

Immediately following the trial of the issues, during which it became quite evident that some of the conduct of Respondent's agents was violative of the Act, Respondent recognized the charging union as the collective bargaining agent of all employees within the appropriate unit sought by said union.

As the result of extensive negotiations lasting many months, a five-year collective bargaining agreement was executed and became effective April 18, 1966. This was some five months following the trial itself and the execution of said collective bargaining agreement was substantially prior to the issuance of the Trial Examiner's Decision on June 21, 1966.

Aforesaid collective bargaining agreement provided for, *inter alia,* wages, hours and conditions of employment, and disposed of all issues such as vacations and bonuses, which are included in the Order of the Board.

The actions of the parties themselves, as exemplified by the above stipulation, provides a total answer to the dispute and by itself evidences the success of voluntary collective bargaining without interference by the Board.

The Board saw fit, however, to ignore aforesaid stipulation.

As a matter of fact, following the issuance of the Order by the Board, Respondent, with full approval and acquiescence of the charging union, offered to comply with the Board's order in every respect except that portion of the order relating to the reinstatement of Paul Infante. The Board refused this offer on the ground that Respondent would either have to comply with the Board's order in every respect, without exceptions, or the Board would pursue its remedies before this Court for enforcement of the entire order.

The Board's refusal, if not without precedent, is most certainly an exercise in futility which explains to a very considerable extent why parties seeking relief before the Board must wait for years before relief is

obtained, which more often than not comes much too late.

In over-simplified terms, Respondent offered to litigate before this Court only the issue relating to the reinstatement of Paul Infante and agreed to comply in every respect with all other provisions of the Board's offer. This offer was unjustifiably refused. The Board's explanation for this refusal on pages 22 and 23 of its Brief is meaningless and punitive in nature. The Board's order, except as it affects the reinstatement of Paul Infante, is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.

II.

All Aspects of the Case (Except Those Issues Relating to Reinstatement of Paul Infante) Are Now Moot.

None of the cases cited by the Board on pages 22 and 23 of its Brief apply to the facts at bar. Therein, the Board, in support of its contention that no aspect of the case is moot, cited a number of cases. Respondent has reviewed each and every one of those cases and respectfully submits that none of them could arguably apply to the issues in the instant case.

In each and every one of the cases cited, there remained certain areas of disagreement between the employer and the charging labor organization. There is no disagreement here. Furthermore, the issue relating to Paul Infante is divisible and severable from all the others. Each and every one of the striking employees was reinstated following a strike of a short duration and all other issues with which the Board has seen

fit to concern itself, such as vacations and bonuses which at the outset were threatened to be taken away by Respondent, were subsequently resolved to the eminent satisfaction of the charging labor organization and the employees who ratified. A five-year collective bargaining agreement covering all of those issues was executed by the parties on April 18, 1966, and all matters except the Paul Infante matter have been disposed of much more effectively than the Board itself could have done by way of any order.

Since Respondent has effectuated the policies and the intent of the Act by negotiating and resolving all issues except the Paul Infante matter, the Board was not justified in concluding that it is necessary or desirable to add the sanctions of an order to the agreement that the parties had themselves reached. Respondent respectfully submits that the various other violations of the Act were rendered moot by the collective bargaining agreement since these had in fact been remedied.

To require Respondent some two to three years following the execution of the agreement to post notices, for example, that it recognized the union and that it would bargain in good faith, borders on the ludicrous, if not ridiculous. Nor would the employees understand the posting of any order to that effect. Respondent fully understands the nature of public rights as opposed to private rights involved in the cases cited on pages 22 and 23. The common denominator in all of those cases was that the parties had not resolved the pending disputes, which led to filing of unfair labor practices, to the Board's satisfaction. Here, all disputes, except the Paul Infante matter, have been unquestionably resolved.

III.

Substantial Evidence on the Record as a Whole Refutes the Board's Finding That Respondent Violated Section 8 (a) (3) and (1) of the Act by Refusing to Reinstate Striker Paul Infante.

In spite of the settlement of the dispute, the parties lack the power to negotiate a disposition of the 8(a)(3) charge and this is the only issue left which was not negotiated and resolved by the parties. Furthermore, there was nothing to negotiate in this regard since employee Paul Infante never made an unconditional offer to return to work and his entire course of conduct demonstrates that he never had any intention of resuming his status of employment in his former position with the Respondent.

The facts against which the 8(a)(3) charge must be viewed are as follows:

1. That Paul Infante was never *discriminatorily* refused any reinstatement to his former status.

2. That Paul Infante never made an unconditional offer to be reinstated.

3. That, if the Board finds that some offer to be reinstated was made by Infante, such offer was conditional and the offer was made belatedly.

4. That Respondent never refused to reinstate Infante.

5. That, should the Court find that reinstatement of Infante is a proper remedy in the instant case, such reinstatement should not be with any back pay penalties.

Stated briefly, the strike at the time it commenced was an "economic" strike. It is clear that when the

employees refused to commence work on the morning of April 5, they commenced striking for economic benefits and, on the record, had not yet made any contact with the union. If it was an economic strike at its outset on April 5th, as Respondent contends, Respondent finds little quarrel with the Trial Examiner's Findings of Fact and Conclusions that at all times thereafter the charging union had been designated exclusive bargaining representative of all employees in the unit sought by the union. It was not until the afternoon of April 5th that agents of the union contacted Respondent, advising that the employees had selected the union to represent them and that the union, for that reason, requested a meeting with Respondent's agent.

Suffice it to say that the striking and picketing continued until the afternoon of Wednesday, April 14th, by which time all but approximately four or five of the company's employees had returned to work [Trial Examiner's Decision, p. 7, lines 7-10 incl. This was stipulated to by counsel for all the parties on the record].

The employee, Paul Infante, and Respondent both testified that for over a year prior to the strike Infante had been a driver on a route.

There is no dispute on the record that *Infante had actual knowledge of the fact that "when the other men went back to work, he decided that he would not go back. As he explained it, 'It just did not occur to me to go back, then and there.'"* (Emphasis added) [Trial Examiner's Decision, p. 11, lines 57-59].

Infante also admitted that he gave an affidavit to a Board agent which contained a statement to the effect that Infante had decided that he would not return to

work even after the others had told him that they were returning, and that the first and only time he reapplied for his job was Wednesday, April 29th, when he spoke to his foreman about 6:30 a.m. This was preceded by a phone call from Infante to his supervisor on April 27th at which time he was told to come in the next morning. This he failed to do [Tr. Vol. V, p. 138, lines 13-19, incl.].

On the record referred to above, it is undisputed that Infante had actual knowledge that all other employees had returned to work, decided he would not go back to work then and there, and that he did not reapply for his job until Wednesday, April 29th, when he spoke to his foreman about 6:30 a.m. It is also undisputed from Infante's own testimony that the supervisor had merely said, "There are no openings right now." Infante himself understood this to mean that all the trucks had already left the Respondent's yard to make their daily pickups and there was no truck available for Infante to drive at that time of the day [Tr. Vol. V, p. 737, lines 8-24, incl.].

Infante further testified that he did not go back to the company and request reinstatement to his job until after he had been informed by an official at the Unemployment Compensation office of the State of California that he was ineligible for such compensation because the other men had gone back to work and he could get his job back if he applied for it. It is undisputed that in the Respondent's operations, there are some drivers and swampers who are assigned to regular routes and there are some who come to the yard each morning for assignment to a truck [Trial Examiner's Decision, p. 12, lines 7-16, incl.].

The Trial Examiner [see his Decision p. 13, lines 26-61 incl., and p. 14, lines 1-17, incl.] makes his observations on the facts surrounding Infante's belated attempt to be reinstated to employment and to the reasons for making such application two weeks later. It is quite obvious from reading the Trial Examiner's editorial comments that he credits Infante with refusing to return to employment even after the others did because Infante "persevered in his determination" and that "Infante did not relish the idea of calling off the strike and returning to the employment of the company." Thereafter, the Trial Examiner charges the company with unfair labor practices, financial pressure, lies and deceit as justification and factors which apparently were relied on by Infante as his reason why he did not return to work. Respondent categorically and vehemently resents those accusations, excepts to them, and further states that on the record borne out by Infante's direct and cross-examination no such justification was ever relied on by Infante at all. The Trial Examiner's diatribe against the Respondent in reference to the fact that some men capitulate quickly while others, "in accord with their character and intelligence may see through these tactics and continue to strike for a longer time, such as Infante," is totally unjustified and finds no basis in the record made at the trial of the issues.

The Court's attention is respectfully called to that portion of the record dealing with the direct and cross-examination of Paul R. Infante [p. 711, to p. 750, lines 18, incl.]. The highlights and salient points brought out in the examination of Infante are as follows:

1. Infante testified that he picketed for about a week and one-half [See Tr. p. 726, lines 14-15].

2. That the last day Infante picketed Respondent's premises was Wednesday the following week, which would be April 14, 1965 [Tr. p. 726, lines 22-25; p. 727, lines 1-6, incl.].

3. Infante knew that the other employees had told him they were returning to work and that, in fact, they had returned to work [Tr. p. 729, lines 9-13, incl.].

4. That the first contact Infante made with Respondent was by way of a telephone conversation he had with Joel, his erstwhile supervisor at Respondent's company, on April 27, 1965, when he called him in the evening of April 27, at which time Joel, in response to Infante's query as to whether he had a job for him, said, "Go early in the morning and he would see what he could do." [See Tr. p. 729, line 24, through p. 730, line 17, incl.].

5. That Infante did not show up on April 28th and did not talk to any agent of Respondent [See Tr. p. 732, lines 11-17, incl.].

6. That Infante made no effort of any kind and at no time made any contact of any nature whatsoever with Respondent following his conversation face to face with aforesaid supervisor on the morning of April 29th; that he got a job with the Yorba Linda Packing House immediately after the 29th [See Tr. p. 723, lines 6-9, incl.]. The inference to be drawn from this was that he had no real interest in returning to work and preferred working elsewhere.

7. That Infante, at no time, relied on any conditions, unlawful or otherwise, which Respondent pur-

portedly was imposing as a condition to reinstate former employees, for his failure to apply for reinstatement, and that he merely had decided on his own not to go back to work. This refutes categorically the Trial Examiner's finding that Infante was continuing his own strike because of Respondent's unfair labor practices, lies and deceits. As a matter of fact, the record is crystal clear that Infante had no knowledge of the fact that Respondent was purportedly requesting employees to sign a statement revoking the authorization cards previously signed with the charging union as any condition of reinstatement [Tr. p. 729, lines 9-13, incl.].

8. As a follow-up to Infante's motives not to return, the record clearly shows that the return of the other employees to work with Respondent did not change Infante's thinking at all, and that he, "just thought of looking, you know, for another job." [See Tr. p. 736, lines 7-23, incl.] And further that he never showed up at Respondent's offices again because he got another job immediately [See Tr. p. 737, lines 18-23, incl.].

9. That Infante well knew that everybody else was being reinstated as the result of his conversation with an unidentified official in the State Unemployment Compensation offices which caused him to make his contact on the telephone on April 27th and in person on April 29th with Respondent's supervisor [Tr. p. 738, lines 4-12, incl.].

10. That the only motivation for Infante applying or making contact with Respondent on the 29th was the

direct result of being advised that he was no longer eligible for unemployment compensation. [See Tr. p. 740, line 22, through p. 741, line 6, incl.]. In connection with this phase of Infante's testimony on cross-examination, although he makes reference to April 28th in this phase of it, it was made crystal clear that at all other times and thereafter he in fact never saw anyone on the 28th. Infante repeatedly admitted no personal contact had been made between him and respondent on the 28th.

11. The General Counsel's efforts on redirect examination by way of leading questions to have Infante testify that his reasons for not returning to work were because he knew that certain papers had to be signed by the employees failed dismally. In reference to that paper which the employees weer signing. Infante testified loud and clear that he did not know the contents or the nature of the paper to be signed and that he, "just heard from the other guys—other guys told me there that it said it would give them a five dollar raise and then when they got more houses to pick up, they would give them the other ten dollars after that." And that he did not remember anything else that the paper contained [See Tr. p. 741, lines 10-26, incl.].

12. Again on redirect examination the Trial Examiner himself examined the witness and asked him once more why he decided not to return to work when the other people were going back, at which time Infante stated, "I just decided that. That is all." [Tr. p. 744, lines 4-10, incl.].

Infante's obvious state of mind was that he could get his job back on the basis of his conversation with the Unemployment Compensation official [Tr. p. 715, line 23, through p. 716, line 2, incl.].

As additional evidence of what transpired on the morning of the 29th, Infante repeatedly testified that he "saw all the trucks go out" [Tr. p. 720, lines 21-22] and that he was told by the supervisor as to his reason why he was not being put to work immediately "because there is no room for you. All the trucks are filled up." (The confusion of what transpired on April 28th is cleared up by the witness when he stated that he had been talking about the 29th and not the 28th because on the 28th he did not have any conversation with Joel.) [Tr. p. 722, lines 12-17, incl.].

Respondent contends, therefore, on the basis of the record that, although Infante knew that all the other employees had returned to work, he made no effort in that direction himself. His efforts of April 27th and 29th were not only too late, they were too confusing and equivocating to constitute an unconditional offer to return. Absent such a timely offer, Respondent's obligations to Infante, if any, terminated.

At best, Infante's contract with the employer on April 27th, and more particularly on the morning of April 29th, can be characterized as showing up belatedly on the morning of the 29th when all the trucks were gone and being told that there was no room for him on any of the trucks *that day.*

Once all the employees except several had returned to work and Infante still continued his picketing, Respondent contends that Infante had constructive as well as actual knowledge that he could have his job back. Thereafter, the responsibility rested on Infante unequivocally to tell Respondent he was ready, willing and able to return to work. He did none of these things.

He waited some thirteen (13) days following the return to work by all other employees before making a phone contact, then showed up two days later when all the trucks had gone out for the day.

His failure to do any of the above things should be considered fatal to any back pay remedy, even if the Court should hold that he was entitled to reinstatement should he desire it.

Also fatal to any remedy is Infante's delay by some fifteen (15) days in applying for reinstatement since he had full knowledge at all times that all the other employees had been put back to work and that his job was available to him at the same time as to the others.

ARGUMENT AND POINTS AND AUTHORITIES.

A. Voluntary Settlement Should Be Honored by the Board.

Respondent contends that the Board should accept the voluntary Stipulation and settlement as a final disposition of all issues raised.

The intent of the Act is to create an environment in which the collective bargaining process is free to reach a result acceptable to all concerned. If this policy is to have any meaning, a duly executed settlement agreement should be honored. (*Jackson Mfg. Co.,* 129 NLRB 460 (1959); *Administrative Decisions of General Counsel,* Nos. SR-743, R-763, SR-472.)

B. Respondent Made an Unequivocal Offer to Reinstate All Striking Employees, Including Infante.

Immediately upon the cessation of picketing and other concerted activities, Respondent offered to reinstate all striking employees. In spite of this fact, Infante failed to return to work, even when all other employees had done so. Ifante did nothing for fifteen days. Respondent's conduct in reinstating all other employees constituted the offer to return which they all accepted. Infante's conduct constituted a refusal of this offer. Where an employer offers reinstatement and the employee refuses that offer, the employee's rights against the employer terminate immediately. *NLRB v. Abbott Publishing Co.,* 331 F. 2d 209 (CA-7 1964); *Nevada Truck & Casing Co.,* 131 NLRB 1352 (1961).

C. Infante Is Not Entitled to Reinstatement or Back Pay Since He Failed to Make a Timely and Unequivocal Application for Reinstatement.

A request for reinstatement must be made within a short time after the strike has ended. *Crosby Chemicals,* 105 NLRB 152 (1953); *Art Crayon Co., 7* NLRB 102 (1938).

A strike ends when other employees go back to work and the offer to the employees to reinstatement and the acceptance by the employees of such reinstatement takes place. *R. J. Oil & Refining Co.,* 108 NLRB 641 (1954); *Freisinger (North River Yard Dyers),* 10 NLRB 1043 (1939); *Carrollton Metal Products Co.,* 6 NLRB 569 (1938).

Here, the employer's conduct constituted an offer to all employees for reinstatement. All employees, including Infante, knew of the offer and all, except Infante, accepted it. For fifteen days after all other employees had returned to their jobs, he did not even approach Respondent. By that time such rights as he might have had had withered and died. For, as recognized by the Board, (*Williams Coal Co.,* 11 NLRB 579) timing is one of the crucial elements in reinstating strikers and, where some strikers return to work, all strikers are thereby required to make a timely and unequivocal application for reinstatement or to lose their rights.

Here, the strike had been over for two weeks before Infante even called Respondent. Then, when told to return to work at a certain time before the work com-

menced the following morning, he did not do so but showed up a day late, at a time when he knew all the available trucks would have left Respondent's plant on their assigned routes to pick up trash and garbage. He simply was told that the trucks had left and that there was no work available for him *that day.* Infante was never heard from again. Neither his words nor his conduct amount to a request for reinstatement. Infante, by his own conduct, failed to reply to Respondent's offer to return to work and is, therefore, entitled to no remedies or relief under the Act. See *G. W. Emerson Lumber Co.,* 101 NLRB 1046 (1952).

D. General Counsel Carries Burden of Proving by Substantial Evidence That Not Only the Discharge but Also the Refusal to Reinstate Was Discriminatory in Order for the Board to Apply the Drastic Remedies of Reinstatement and Back Pay.

Finmore Corp., 131 NLRB 84 (1961);
Radio Industries, 11 NLRB 912 (1952).

In applying this same rule in reference to the employer's rights to discharge or refuse to reinstate, the Circuit Court in *NLRB v. Tex-O-Kan Flour Mills, Inc.,* 122 F. 2d 433, stated:

> "So far as the (Act) goes the employer may discharge, or refuse to reemploy for any reason, just or unjust, except discrimination because of union activities and relationship." (p. 438).

Respondent did not discriminate against Infante, or any other employee, because of union activities and

relationship. Instead, Respondent immediately reinstated all employees who applied, and immediately sat down with the union and negotiated a collective bargaining agreement which has since been executed for a term of five years. The lack of any anti-union animus on Respondent's part is further evidenced by the Stipulation on file herein requesting a dismissal of all issues which the parties themselves have the power to dismiss. Against this factual background, the General Counsel cannot even begin to sustain its burden of proving, by substantial evidence, that Respondent discriminated against Infante.

> "Court has discretion to deny enforcement of the Board's order on the ground that there has been no affirmative showing of an unlawful anti-union motivation on the part of the Employer." (*NLRB v. Great Dane Trailers,* 388 U.S. 26).

Thus, an employee's failure to report to work when told to do so justifies his discharge by the employer. *Aluminum Screen & Window Co.,* 136 NLRB 663 (1962); *Hot Shoppes, Inc.,* 146 NLRB 81 (1964); *Wear Ever Shower Curtain Corp.,* 143 NLRB 34 (1963). Here, the Board should reject the charge of a discriminatory failure to reinstate for the additional reason that, even though his tardy application for reinstatement was considered by Respondent, Infante himself failed to follow the simple, procedural steps required to regain his position. The General Counsel cannot produce one fact to show that Respondent discriminated against Infante. Infante did this himself.

E. Even if Infante Should Be Entitled to Reinstatement, He Is Not Entitled to Back Pay.

Back pay is a separate and additional remedy from reinstatement. *NLRB v. Ingram,* 273 F. 2d 670 (CA-5 1960). In *Ingram,* the Court quotes the *Tex-O-Kan Flour Mills, Inc.,* and explains the nature of a back pay award as follows:

> " 'Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law. The evidence to justify them ought therefore to be substantial, and surmise or suspicion, even though reasonable, is not enough.' " (p. 675).

Conclusion.

The Stipulation and settlement agreement should be a final answer to all issues raised in this case. The order the Board seeks to enforce here, including the reinstatement of Paul Infante, would seriously impair the harmonious bargaining relationship between the parties and would frustrate rather than effectuate the policies of the Act.

In addition, independent of the Stipulation and settlement agreement, the facts demonstrate that Infante should not be given any relief under the Act. Of primary importance is the fact that Respondent did not discriminate against anybody, including Infante. All employees were offered reinstatement; all accepted the offer immediately, except Infante. His offer to return, if it was an offer, came too late. In addition, he fur-

ther demonstrated to Respondent his total lack of interest in his job.

Infante is not entitled to either reinstatement or back pay. Respondent has not discriminated and should not be penalized with an order requiring it to either reinstate a person who obviously did not want reinstatement, or to pay him for work he did not offer to perform.

For the reasons stated, it is respectfully requested that the Court refuse to issue a decree enforcing the Board's order in any respect.

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